

Zhao (Migration) [2020] AATA 4338 (19 August 2020)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Na Zhao
CASE NUMBER:	1903881
DIBP REFERENCE(S):	BCC2018/4335874
MEMBER:	Meredith Jackson
DATE:	19 August 2020
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 19 August 2020 at 12:50pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document in visa application – bogus bank document – compassionate or compelling circumstances to waive criterion – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2 cl 500.217; Schedule 4 Public Interest Criterion 4020*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 1 February 2019 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 5 October 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found the applicant did not meet Public Interest Criterion (PIC) 4020, subclause 4020(1). The delegate's decision, provided to the tribunal by the applicant, recorded that she had not responded to a natural justice letter from the department in which she was given an opportunity to comment on adverse information arising from an investigation into whether she had provided a bogus bank document in support of her application.
6. The applicant appeared before the Tribunal by telephone on 17 August 2020 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. *Documents considered by the Tribunal*
14. The applicant provided the delegate's decision. It includes details about a document found to be bogus by a departmental integrity check, which is a Certificate of Personal Creditworthiness provided in the original and being a Certification of Deposit purportedly issued by the ICBC Industrial and Commercial Bank of China Taiyan Chngjian branch stating that the applicant holds a deposit account to 13 February 2019 in the amount of RMB 200,000 in an account with a deposit/account opening date of 18 July 2017.
15. The Tribunal also had regard to the Tribunal and departmental files.
16. *The hearing*
17. In the hearing, the applicant stated she clearly understood the interpreter. She stated:
 - a. She was currently in Malaysia with her partner with whom she registered a marriage in China on 1 August 2018. The parties also registered the marriage in Malaysia in January 2020;
 - b. She is not accompanied by her child born in 2016 of a previous marriage; the child is currently in China with a grandparent;
 - c. She is currently enrolled to study in Australia;
 - d. She did not complete her application for the visa herself, she authorised a person to do everything for her. The person was referred to her by a friend and she communicated with him only through WeChat; she did not know where he was located; she did not see the application before it was submitted because she trusted this person;
 - e. After the department sent her a natural justice letter inviting her to comment on adverse information concerning the financial document submitted with her

application (*the document described in paragraph [10]*), she did not respond to the department, she asked the agent to respond for her, but he said it was useless;

- f. She believes the document is genuine and she wanted to demonstrate that to the department but the agent said it was not needed;
- g. The agent got the document in China;
- h. *Following questions from the Tribunal about whether she accepted now that the document was fake, she stated:* I accept;
- i. She is not enrolled to study currently but she wants to study English;
- j. *The Tribunal put to the applicant that it might have a concern that she knew the document was not genuine and asked if she had any further comment to make. The applicant responded that she did not.*
- k. *The Tribunal raised the question of the waiver and explained its role; she stated:* She did not know of any circumstances that would justify the application of the waiver.

18. *Analysis*

19. The Tribunal notes that the applicant did not provide the Tribunal with any documentary submissions in support of her case other than her passport and the delegate's decision.
20. As described in paragraph [8] above, the requirement in PIC 4020(1) not to provide a bogus document, applies whether or not the Minister became aware of the bogus document because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly. Nevertheless, to be fair and reasonable in the applicant's particular circumstances, the Tribunal has considered whether the migration agent she referred to (who remains, for the Tribunal, of unspecified name and location), submitted the application for the visa and obtained and filed the document found to be bogus without the applicant's knowledge. She claims he did, and that when she raised with him her concerns about the correspondence from the department seeking comment on adverse information, he told her a response was not necessary and/or useless. The Tribunal has considered this in its full context but is not convinced by the applicant's statements concerning either the existence of or the actions of the agent. The Tribunal considers it unlikely that the applicant allowed her visa application to be submitted by someone she did not know, with whom she communicated only via WeChat and whose location she could not name. The Tribunal finds it unlikely that she accepted such remote advice, including that to respond to the department would be "useless". The Tribunal questioned the credibility of her brief accounting in the hearing, and found the applicant, in responding to its questions, to be evasive and unforthcoming, making only the most economical of statements in support of her case. The Tribunal notes that the applicant contradicted herself within the hearing on whether she was currently enrolled; and further, appeared not to accept that she had a responsibility for the integrity of the application, particularly the relevant submission of documents and her accountability to the visa process and the department. That the document was found in a credible departmental process to be bogus, elicited little response from the applicant either at the time or on review, and she did not make much effort to convince the Tribunal she was a worthy applicant for the grant of a student visa. At one stage in the hearing, she claimed

that the information in the document found to be bogus was genuine, but later accepted it was fake. The Tribunal was not convinced by the applicant's account of events relating to the document or her alleged agent, and reasonably concludes that it cannot rely on her explanations for the document's provision. It prefers to place strong weight on the outcome of the department's offshore investigation of the document, which found it to be bogus. It places very little weight on the applicant's evidence about the document and its provision.

21. After close consideration of all the evidence before it, the Tribunal finds that the applicant has given, or caused to be given, in support of her application for the visa, a 'bogus document', as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects is counterfeit or has been altered by a person who does not have authority to do so.
22. Therefore, the applicant does not meet PIC 4020(1).
23. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
24. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
25. For the following reasons, the Tribunal is not satisfied that the requirements should be waived. The applicant does not claim there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the granting of the visa. There is no evidence before the Tribunal that any such circumstances exist in this matter. Therefore the requirements of PIC 4020(1) OR (2) should not be waived.
26. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.500.217(1).
27. The applicant does not claim to meet the criteria for any other subclass within the class of visa sought.

DECISION

28. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Meredith Jackson
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...